

October 28, 2016

**VIA ELECTRONIC FILING**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: WC Docket No. 11-42 Lifeline and Link Up Reform and Modernization  
WC Docket No. 09-197 Telecommunications Carriers Eligible for Universal  
Service Support  
WC Docket No. 10-90 Connect America Fund  
EX PARTE PRESENTATION**

Dear Ms. Dortch:

This letter is submitted on behalf of our client, TracFone Wireless, Inc. (“TracFone”). By this letter, TracFone notifies the Commission that it supports the Lifeline Connects Coalition (“Lifeline Connects”) Petition for Waiver filed in the above-captioned proceedings on October 25, 2016. For the reasons set forth herein, TracFone respectfully urges that the Commission grant the requested waiver.

Lifeline Connects’ waiver petition seeks relief similar to that sought by TracFone, both in a petition for reconsideration of the Commission’s Lifeline Modernization Order (Lifeline and Link Up Reform and Modernization, et al) (Third Report and Order, Further Report and Order, and Order on Reconsideration), 31 FCC Rcd 3962 (2016)), and in a motion for stay or, in the alternative, deferral of the effective date of revised 47 C.F.R. § 54.407(c)(2)), filed September 8, 2016. As described by TracFone in those filings, the Lifeline Modernization Order articulates no explanation or reason for reducing the non-usage period for de-enrollment from the Lifeline program based on consumer non-usage from 60 days to 30 days, and for reducing the customer notification and cure period from 30 days to 15 days (other than to reference the wholly-irrelevant expansion of “usage” to include outbound text messaging). Moreover, TracFone noted in subsequent ex parte letters that there exist significant ambiguities and internal inconsistencies in the Commission’s rules governing when Lifeline providers must de-enroll non-using customers, and when Lifeline providers may no longer be reimbursed for providing service to Lifeline customers prior to de-enrollment – ambiguities and inconsistencies which are further muddled by Universal Service Administrative Company (“USAC”) training materials going back to 2012 (see, e.g., TracFone ex parte letter filed in these dockets dated October 5, 2016).

The problematic aspects of the forthcoming changes to the de-enrollment for non-usage rule have been addressed in detail by TracFone, Lifeline Connects, and other commenters, and will not be reiterated here. However, TracFone believes that either an interim waiver as requested by Lifeline Connects or a stay or deferral of the rule changes as requested by TracFone is necessary to prevent disruption to the Lifeline program, to prevent consumer displacement and

harm, and to ensure that the rule changes are implemented in a lawful manner. In this regard, TracFone brings to the Commission's attention the following:

First, granting a blanket interim waiver of the revisions to the de-enrollment for non-usage rule, specifically, Section 54.407(c)(2), as requested by Lifeline Connects, is one way to prevent the hardship and disruption which would result from implementing the revised rule before the reason for the rule revision is explained and the intended operation of the rule (and related Section 54.405(e)(3)) is clarified by the Commission. From a procedural perspective, Lifeline Connects is correct: waiver requests may be acted on by the Wireline Competition Bureau pursuant to delegated authority; reconsideration of a rule as well as staying or deferring a rule's effective date may require action by the Commission. Whether achieved via waiver or via stay, it is of paramount importance that the changes to the de-enrollment for non-usage rule not be implemented on December 2, 2016.

Second, Lifeline Connects has brought to the Commission's attention a critically important factor not raised by TracFone. On October 5, 2016, USAC issued the following guidance to Lifeline providers regarding implementation of the revised rule:

The 30 day non-usage period will apply to all subscribers, **even if their non-usage period begins before December 2**. On December 2, subscribers who are currently in a non-usage period of 30 or more days will be notified that they risk de-enrollment if they do not use their benefit in the next 15 days.  
(emphasis added)

What USAC's guidance does (if permitted by the Commission) is blatantly unlawful. Per the USAC guidance, the rule changes which establish a 30 day non-usage period and a 15 day cure period commencing on the December 2, 2016 effective date will govern contact and mandatory de-enrollments following a 15 day cure period which commences **before** the December 2, 2016 effective date. In short, USAC's guidance would advance the effective date of a Commission-promulgated rule. Absent highly unusual circumstances, agency rules are to be prospectively applied only. See, e.g., Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988) ("Congressional enactments and administrative rules will not be construed to have retroactive effect unless the language requires this result."). The Commission's attention is also directed to Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737 (D.C. Cir. 1986). There, the District of Columbia Circuit addressed when and how an agency may give retroactive application to a rule: "The agency must explain how it determined that the balancing of harms and benefits favors giving a change in policy retroactive application. **Only if an agency explains its rationale for retroactively changing its prior practice can a reviewing court determine whether that decision is a product of sound and reasoned analysis.**" 794 F.2d at 746 (emphasis added).

Nothing in the Lifeline Modernization Order provides any indication that the Commission intended to change the de-enrollment for non-usage rule retroactively or to promulgate any revisions to the Lifeline rules on a retroactive basis. It is hornbook law as reflected in the above-cited cases and myriad others that agency rules are not afforded retroactive

application unless the agency i) clearly intends that they do so; and ii) provides a reasoned explanation for its decision. Neither condition exists with respect to the de-enrollment for non-usage rule.

Moreover, USAC's attempt to unilaterally give retroactive application to a Commission rule is far outside the scope of USAC's powers. USAC's functions and responsibilities are codified and listed with particularity at Section 54.702 of the Commission's rules (47 C.F.R. § 54.702(a)-(o)). Conspicuously absent from those enumerated functions and responsibilities is any reference either to promulgating rules or to establishing or modifying the effective dates of Commission rules. Indeed, USAC does not have the power even to interpret rules. See 47 C.F.R. 54.702(c) ("the Administrator may not make policy, interpret, unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act of the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.").

Unfortunately, the lack of clarity with regard to when Lifeline providers must terminate service to non-using Lifeline consumers, and when the providers may no longer claim reimbursement for serving such customers created a vacuum which USAC attempted to fill by announcing in its guidance that it would implement the revised and reduced 15 day cure period (adopted with the revised and reduced 30 day non-usage period) prior to the revised rule's effective date. This *ultra vires* and otherwise unlawful action needs to be addressed by the Commission before the revised rule take effect.

Finally, TracFone understands that some at the Commission may be reluctant to reopen any aspect of the rule changes promulgated by the Lifeline Modernization Order – an order which involved substantial effort by the Commission and led to significant acrimony last March. However, as TracFone noted in its October 21, 2016 comments in support of the United States Telecom Association's petition for temporary waiver of the revisions to the Lifeline eligibility criteria rules to afford certain states an opportunity to conform their rules with the Commission's rules governing eligibility criteria, the Commission should not avoid making refinements to changes in the Lifeline rules where immediate action is necessary to avoid program disruption or to prevent consumer hardship. For the reasons presented to the Commission by Lifeline Connects, TracFone and others, TracFone respectfully urges the Commission to take such action as is necessary and appropriate so as to delay implementation of the changes to the de-enrollment for non-usage rule until such time as the purpose for the rule changes has been articulated by the Commission and until such time as the problems associated with implementation of the rule revisions are addressed and resolved. Whether that result is achieved through interim waiver, through stay or deferral, or through substantive reconsideration of the rule change, it should be addressed prior to the rule changes and resulting reductions to the non-usage and notification/cure periods become effective.

Ms. Marlene H. Dortch

October 28, 2016

Page 4 of 4

Pursuant to Section 1.1206(b) of the Commission's rules, this letter is being submitted electronically. If there are questions, please communicate directly with undersigned counsel for TracFone.

Sincerely,



Mitchell F. Brecher

Cc: Ms. Gigi Sohn  
Ms. Stephanie Weiner  
Mr. Travis Litman  
Mr. Claude Aiken  
Mr. Matt DelNero  
Mr. Trent Harkrader  
Mr. Ryan Palmer  
Mr. Nathan Eagan  
Ms. Garnet Hanly